

ESTTA Tracking number: **ESTTA467534**

Filing date: **04/17/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91199752
Party	Plaintiff Evonik Degussa GmbH
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Attachments	TRADEMARK 2.PDF ( 19 pages )(250113 bytes )

In the Matter of Application Serial Nos. 85/096,047 and 79/083,600

V.

Opposition No. 91199752 (parent)  
Opposition No. 91200334

Pursuant to the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 528, 37 C.F.R. § 2.127, and FED. R. CIV. P. 56, Evonik Degussa GmbH (“Evonik”) moves the Board for summary judgment in its Opposition No. 91199752 against Afgritech Ltd.’s (“Afgritech”) Application Serial No. 85/096,047 for the mark AMINOGREEN for animal feed supplement and livestock feed (the “AMINOGREEN Mark”). Afgritech filed its application for the AMINOGREEN Mark on July 29, 2010 as an intent-to-use application. Thus, pursuant to 15 U.S.C. § 1051(b), Afgritech must have had “a *bona fide* intention” to use the AMINOGREEN Mark to identify animal feed supplement and livestock feed in commerce when it filed its application; if it did not, the application is void *ab initio*, and Evonik’s opposition must be sustained. Afgritech did not have such intent. More specifically, the absence of *any* documentary evidence corroborating Afgritech’s supposed intent is sufficient to prove that Afgritech in fact lacked the requisite *bona fide* intent to use the AMINOGREEN Mark. Evonik’s Opposition No. 91199752 must be sustained – and Afgritech’s Application Serial No. 85/096,047 must be refused – on this ground alone.

## STATEMENT OF UNDISPUTED MATERIAL FACTS

Afgritech filed its first application for the AMINOGREEN Mark for animal feed supplement and livestock feed, Application Serial No. 78/917,849, on June 27, 2006.<sup>1</sup> Because Afgritech filed its Application Serial No. 78/917,849 as an intent-to-use application pursuant to 15 U.S.C. § 1051(b), it was required to represent to the United States Patent and Trademark Office (“PTO”) that it had “a *bona fide* intention to use . . . the mark in commerce on or in connection with the identified goods.” Afgritech did so, and the PTO issued a Notice of Allowance for that application on May 8, 2007. Pursuant to 15 U.S.C. § 1051(d), Afgritech was then required to file a verified statement that it had used the AMINOGREEN Mark in commerce before its application would mature into a registration. It never did so. Instead, Afgritech requested five extensions of time to file the statement of use. In each of those requests, Afgritech continued to represent to the PTO that it had a “*bona fide* intention” to use the AMINOGREEN Mark. Yet Afgritech never filed a statement of use for its Application Serial No. 78/917,849. Accordingly, on June 7, 2010, the PTO issued a Notice of Abandonment. On July 29, 2010 – a mere month after its first application was abandoned – Afgritech filed a second intent-to-use application for the AMINOGREEN Mark: Application Serial No. 85/096,047. In so doing, Afgritech again represented to the PTO that it had a “*bona fide* intention” to use the mark. Yet before the PTO could issue another Notice of Allowance (and thus restart the clock for Afgritech to file its statement of use), Evonik filed the instant Opposition No. 91199752 on the grounds that Afgritech’s intended use of the AMINOGREEN Mark would cause confusion with Evonik’s AMINORED mark, which is the subject of Evonik’s Application Serial No.

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<sup>1</sup> Pursuant to TBMP § 704.03(b)(2) and 37 C.F.R. § 2.122(e), a copy of the application file history for Afgritech’s Application Serial No. 78/917,849, taken from the Trademark Document Retrieval database, is attached as Exhibit A.

79/083,600 (the “AMINORED Mark”). The following undisputed material facts were established in discovery:<sup>2</sup>

- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no non-privileged documents relating to the creation, selection, or adoption of the Mark in the United States. (RFA No. 1; RFP No. 1).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has done no trademark, service mark, or Internet domain name investigation or search relating to the Mark – or at least has no documents relating to any such search. (RFA No. 2; RFP No. 3).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech still – six years later – has no documents relating to when it anticipates use of the Mark in commerce in the United States. (RFA No. 4; RFP No. 9).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents demonstrating the types of goods or services in connection with which it intends to use the AMINOGREEN Mark specifically (as opposed to other marks) in the United States. (RFA No. 5; RFP No. 11).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents relating to the geographic areas or channels of trade in

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<sup>2</sup> Pursuant to TBMP §§ 528.05(a)(1) and 528.05(c), and 37 C.F.R. §§ 2.120(j)(8) and 2.127(e)(2), the following facts are taken from: 1) Afgritech’s “Answers to Evonik’s First Set of Requests for Admission to Applicant,” which are attached as Exhibit B (the “RFAs”); 2) Afgritech’s “Objections and Responses to Opposer’s First Set of Requests for Production of Documents,” which are attached as Exhibit C (the “RFPs”); and 3) Afgritech’s “Objections and Responses to Opposer’s First Set of Interrogatories to Applicant”, which are attached as Exhibit D (the “Interrogatories”).

which it intends to use the AMINOGREEN Mark specifically (as opposed to other marks) in the United States. (RFA No. 6; RFP No. 13).

- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents relating to any advertising, marketing, or promotional materials in which it intends to use the AMINOGREEN Mark specifically (as opposed to other marks) in the United States. (RFA No. 7; RFP No. 15).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no specimens of any product, label, packaging, tag, brochure, advertisement, promotional item, informational literature, or invoice that it intends to use in the United States depicting or bearing any form of the AMINOGREEN Mark. (RFA No. 10; RFP No. 21). In fact, Afgritech does not have any documents even *relating to* any such product, label, packaging, tag, brochure, advertisement, promotional item, informational literature, or invoice. (RFA No. 11; RFP No. 23).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no specimens showing the AMINOGREEN Mark. (RFA No. 12; RFP No. 24).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents relating to any printed or electronic media publication in which it plans to advertise or promote its goods or services in commerce under the AMINOGREEN Mark specifically (as opposed to other marks) in the United States. (RFA No. 13; RFP No. 26).

- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents relating to its past, present, or future marketing plans for the Mark. (RFA No. 14; RFP No. 26).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents relating to the types of customers with whom it intends to do business, and the ultimate purchasers to whom it intends to offer goods or services, under the AMINOGREEN Mark specifically (as opposed to other marks) in the United States. (RFA No. 15; RFP No. 30).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents relating to any market, demographic, or consumer-profile study, or focus-group inquiry, relating to the Mark. (RFA No. 16; RFP No. 32).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents relating its actual and/or projected sales of goods and services under the Mark in the United States. (RFA No. 17; RFP No. 34).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents relating to its planned methods of distribution of goods or services under the Mark in the United States. (RFA No. 18; RFP No. 36).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no documents relating to the amount of money that it has expended or budgeted to promote its goods or services under the Mark in the United States. (RFA No. 19; RFP No. 38).

- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no corporate minutes, resolutions, or any other corporate records relating to the Mark. (RFA No. 20).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has no employees responsible for the promotion, sale, or distribution of goods and services under the AMINOGREEN Mark specifically (as opposed to other marks) in the United States. (RFA No. 21; Interrogatory No. 1).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, no person at Afgritech has ever made any search, inquiry, or investigation relating to the AMINOGREEN Mark in the United States. (RFA No. 22; Interrogatory No. 7).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has not received any opinion relating to whether there is a likelihood of confusion between the AMINOGREEN Mark and any other mark (other than an opinion received after this Opposition was filed). (RFA No. 23; Interrogatory No. 9).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has not budgeted or expended any money to promote the AMINOGREEN Mark in the United States. (RFA No. 24; Interrogatory No. 15).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech has not received any income, or projected any anticipated income, from the sale of goods or services under the AMINOGREEN Mark in the United States. (RFA No. 25; Interrogatory No. 16).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech still has no promotional documents or items that have been used or that it

is considering for use in connection with the promotion and sale of its goods and services under the Mark in the United States. (RFA No. 26; Interrogatory No. 22).

- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, Afgritech cannot identify a single person with knowledge of any market research (including surveys, studies, investigations, or focus-group inquiries) relating to the AMINOGREEN Mark in the United States. (RFA No. 27; Interrogatory No. 28). Nor can Afgritech identify a single person that has participated in the creation or distribution of advertisements or promotions for its goods or services under the Mark in the United States. (RFA No. 28; Interrogatory No. 37).
- Despite claiming to have had a *bona fide* intent to use the AMINOGREEN Mark since 2006, the only non-privileged documents that Afgritech has in its possession that in any way relate to its intent to use the Mark are those documents relating to the prosecution of its successive applications for the Mark: Application Serial Nos. 78/917,849 and 85/096,047. (RFA No. 31).
- Finally, not only has Afgritech itself not used or made plans to use the AMINOGREEN Mark, it has not licensed or otherwise authorized others to do so either. (RFA No. 8; RFP No. 17).

## **ARGUMENT AND CITATION OF AUTHORITY**

### **I. INTRODUCTION.**

Evonik has moved for summary judgment that its Opposition No. 91199752 be sustained – and that Afgritech’s Application Serial No. 85/096,047 for the AMINOGREEN Mark must be refused – because Afgritech lacks the requisite “*bona fide* intention” to use the Mark in commerce. As the Trademark Trial and Appeal Board has explained:

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law.

*Cont'l Airlines Inc. v. United Air Lines Inc.*, 53 U.S.P.Q.2d 1385, 1386 (T.T.A.B. 1999).

Accordingly, where an opposer demonstrates that there is no genuine issue of material fact as to an applicant's lack of a *bona fide* intent to use a mark, summary judgment is appropriate. See *Honda Motor Co. v. Winkelmann*, 90 U.S.P.Q.2d 1660, 1664 (T.T.A.B. 2009) ("Because applicant has not established that there is any genuine issue of material fact as to his lack of a *bona fide* intent to use, opposer's motion for summary judgment is granted."). Moreover, a determination that Afgritech lacked the requisite *bona fide* intent to use the AMINOGREEN Mark would moot Evonik's other bases for this Opposition. See *SmithKline Beecham Corp. v. Omnisource DDS LLC*, 97 U.S.P.Q.2d 1300, 1305 (T.T.A.B. 2010) ("Because we have found that applicant lacked a *bona fide* intention to use the mark in commerce at the time it filed the involved application, we decline to make a determination on the merits on the ground of priority and likelihood of confusion."); *Saul Zaentz Co. v. Bumb*, 95 U.S.P.Q.2d 1723, 1724 n.5 (T.T.A.B. 2010) (same); *Research in Motion Ltd. v. NBOR Corp.*, 92 U.S.P.Q.2d 1926, 1931 (T.T.A.B. 2009) (same).

## II. STANDING.

Standing is a threshold issue that must be proven by a plaintiff in every *inter partes* case. *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999). The purpose of the standing requirement is to prevent litigation when there is no real controversy between the parties. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028 (C.C.P.A. 1982). In this Opposition, Evonik has attached to its notice of opposition copies of the PTO database reports showing the

current status and title of its prior pending Application Serial No. 79/083,600 for its AMINORED Mark for foodstuffs for animals, among other goods and services. Such evidence establishes that Evonik has a real interest in the outcome of this proceeding; that is, that Evonik has a direct and personal stake in preventing the registration of Afgritech's AMINOGREEN Mark for animal feed supplement and livestock feed. *E.g., SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1301. Moreover, once the standing threshold has been crossed, an opposer may rely on any legal ground that negates applicant's right to the registration it seeks. *Estate of Biro v. Bic Corp.*, 18 U.S.P.Q.2d 1382, 1386 (T.T.A.B. 1991).

## II. **BONA FIDE INTENT TO USE.**

The Trademark Act Section 1(b) provides that "a person who has a *bona fide* intention, under circumstances showing the good faith of such person, to use a trademark in commerce" may apply for registration of the mark. 15 U.S.C. § 1051(b). Thus, if an applicant *lacks* the requisite *bona fide* intent to use a mark in commerce at the time that it files an intent-to-use application, the application is invalid. *E.g., Intel Corp. v. Emeny*, 2007 WL 1520948, \*4 (T.T.A.B. May 15, 2007).<sup>3</sup> A challenge to the validity of an application on such grounds may serve as the basis for an opposition. *E.g., TBMP* § 309.03(c)(5). In fact, the question of whether an applicant truly possessed the requisite *bona fide* intent to use an intent-to-use mark is *particularly* well suited for oppositions: while it is practically impossible for a Trademark Examining Attorney to explore the question of an applicant's *bona fide* intent in an ex parte

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<sup>3</sup> This opinion is not designated as precedent of the T.T.A.B. *See, e.g., TBMP* § 101.03 ("Decisions that are designated by the Board 'citable as precedent,' 'precedent of the Board,' or 'for publication in full' are citable as precedent. Decisions which are not so designated, or which are designated for publication only in digest form, are not binding on the Board, but may be cited for whatever persuasive weight to which they may be entitled.").

examination, such intent can more easily be tested in the context of an *inter partes* proceeding. *E.g.*, *Intel Corp.*, 2007 WL 1520948, at \*4.

The determination of whether an applicant possessed the requisite *bona fide* intent to use a mark in commerce is an objective determination based on all of the circumstances. *E.g.*, *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1304. An opposer has the burden of demonstrating by a preponderance of the evidence that the applicant lacked such intent. *E.g.*, *id.* One way that an opposer may do so is by demonstrating that the applicant filed previous intent-to-use applications for the same mark which were abandoned for failure to file a statement of use:

The legislative history of the Trademark Law Revision Act discusses an applicant's *bona fide* intent and sets forth an illustrative list of circumstances that "may cast doubt on the *bona fide* nature of the intent or even disprove it entirely." [These] include the filing of numerous intent-to-use applications to replace applications which have lapsed because no timely statement of use was filed.

*Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1931 (citations omitted). Another way that an opposer may do so is by proving that the applicant has no documentary evidence to corroborate its supposed intent:

Absent other facts which adequately explain or outweigh the failure of an applicant to have any documents supportive of or bearing upon its claimed intent to use its mark in commerce, the absence of documentary evidence on the part of an applicant is sufficient to prove that the applicant lacks a *bona fide* intention to use the mark in commerce as required by Section 1(b).

*Commodore Elecs. Ltd. v. CBM Kabushiki Kaisha*, 26 U.S.P.Q.2d 1503, 1507 (T.T.A.B. 1993); *see also, e.g.*, *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1304 ("The absence of any documentary evidence on the part of an applicant regarding such intent constitutes objective proof that is sufficient to prove that the applicant lacks a *bona fide* intention to use its mark in commerce."); *Saul Zaentz Co.*, 95 U.S.P.Q.2d at 1727 (same); *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1930 (same); *Boston Red Sox Baseball Club LP v. Sherman*, 88 U.S.P.Q.2d 1581,

1587 (T.T.A.B. 2008) (same).<sup>4</sup> If an opposer meets this initial burden of proof, the burden of production then shifts to the applicant to rebut the opposer's *prima facie* case by offering additional evidence concerning the factual circumstances bearing upon its intent to use the mark in commerce. *E.g., Saul Zaentz Co.*, 95 U.S.P.Q.2d at 1727.

So what types of documentary evidence are relevant to this inquiry? In a nutshell, there are certain basic documents that one would *expect* an applicant to possess if that applicant *truly* possessed a “*bona fide*” intent to use a mark, such that the absence of those documents – like the dog that didn’t bark – can serve as objective proof that an applicant lacked the requisite *bona fide* intent. Such documents include:

- Documents concerning the applicant’s selection and adoption of the mark. *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1302.
- Documents concerning the applicant’s trademark searches and investigations for the mark. *Boston Red Sox Baseball Club LP*, 88 U.S.P.Q.2d at 1587.
- Proposed specimens, labels, tags, or packaging incorporating the mark. *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1302; *Boston Red Sox Baseball Club LP*, 88 U.S.P.Q.2d at 1587.
- Documents concerning the applicant’s intended advertising, marketing, or promotion of goods under the mark. *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1302; *Honda Motor Co.*, 90 U.S.P.Q.2d at 1663; *Boston Red Sox Baseball Club LP*, 88 U.S.P.Q.2d at 1587.

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<sup>4</sup> Such an absence of documentary evidence is sufficient to prove that the applicant lacked a bona fide intent to use its mark in commerce *even if* the opposer cannot show that the applicant acted with bad faith to deceive the PTO. The lack of a bona fide intent to use a mark is not the same as fraud, and an opposer need not prove the latter in order to prevail on the former. *E.g., SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1305.

- Business plans or strategies for the use of the mark. *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1302; *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1930; *Honda Motor Co.*, 90 U.S.P.Q.2d at 1662.
- Documents concerning the applicant's intended pricing for the goods to be sold under the mark. *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1302.
- Documents concerning the channels of trade that the applicant is planning to use for the goods to be sold under the mark. *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1930; *Honda Motor Co.*, 90 U.S.P.Q.2d at 1663.
- Documents concerning the classes of consumers or geographic areas that the applicant is planning to target for the goods to be sold under the mark. *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1302; *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1930.
- Market studies, surveys, or focus groups regarding the mark. *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1930.
- Documents concerning the applicant's plans for expansion and growth of product and service lines under the mark. *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1930.
- Documents concerning the applicant's expected date of first use of the mark in commerce. *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1930.
- Documents concerning the applicant's plans to license the mark, if it is not going to use the mark itself. *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1302.

Conversely, while the existence or absence of the foregoing types of documents are relevant to proving or disproving an applicant's *bona fide* intent to use a mark, there are certain kinds of evidence that are *not* relevant to the inquiry, and that an applicant may *not* use to overcome a *prima facie* showing that it lacked a *bona fide* intent to use its mark in commerce.

First, the mere fact that an applicant has filed an intent-to-use application cannot *alone* establish its *bona fide* intent to use a mark; if it could, then the lack of a *bona fide* intent to use a mark would *never* be a ground for opposition or cancellation, because an *inter partes* proceeding can only be brought if the defendant has filed an application in the first place. *E.g., SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1304. Second, an applicant's mere statement that it subjectively intends to use a mark cannot overcome an absence of documentary evidence supporting such a claim:

Evidence bearing on *bona fide* intent is "objective" in the sense that it is evidence in the form of real life facts and by the actions of the applicant, not solely by applicant's uncorroborated testimony as to its subjective state of mind. That is to say, Congress did not intend the issue to be resolved simply by an officer of applicant later testifying, "Yes, indeed, at the time we filed that application, I did truly intend to use the mark at some time in the future."

*E.g., SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1305 (citations omitted); *Saul Zaentz Co.*, 95 U.S.P.Q.2d at 1727 (same); *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1931 (same); *accord L.C. Licensing Inc. v. Berman*, 86 U.S.P.Q.2d 1883, 1892 (T.T.A.B. 2008) ("The mere assertion of an intent to use the mark without corroboration of any sort, whether documentary or otherwise, is not likely to provide credible evidence to establish a *bona fide* intention to use the mark."). Third, an applicant may not overcome an absence of documentary evidence by pointing to foreign registrations, or Internet uses of a mark that are directed to foreign consumers, if such do not show that applicant intended to use the mark *in the United States*. *Honda Motor Co.*, 90 U.S.P.Q.2d at 1664.

### **III. AFGRITECH DOES NOT HAVE THE REQUISITE *BONA FIDE* INTENT TO USE THE AMINOGREEN MARK.**

Applying the foregoing legal principles to the facts of this Opposition, it is beyond dispute that Afgritech did not have – and has *never* had – any kind of "*bona fide*" intent to use

the AMINOGREEN Mark in commerce. To begin with, Afgritech's first application for the AMINOGREEN Mark – Application Serial No. 78/917,849 – was abandoned because Afgritech failed to file a Statement of Use in the allotted time. Afgritech filed the instant Application Serial No. 85/096,047 a mere one month later. As noted above, the filing of successive intent-to-use applications to replace applications which have lapsed because no timely statement of use was filed “may cast doubt” on the *bona fide* nature of an applicant's intent – or even “disprove it entirely.” *E.g., Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1931 (citations omitted).

But even *if* Afgritech could somehow explain away its abandonment of its Application Serial No. 78/917,849 for the AMINOGREEN Mark (and it cannot), it cannot possibly explain why it has done absolutely *nothing* regarding the AMINOGREEN Mark (other than file another application) in the almost-six years since it filed that application. To reiterate: even though Afgritech has supposedly possessed a *bona fide* intent to use the AMINOGREEN Mark for almost six years now (dating back to June of 2006), it has no corporate minutes, resolutions, or any other corporate records relating to the Mark; no employees responsible for the promotion, sale, or distribution of goods and services under the Mark; and no promotional documents or items that it has used or that it is considering using in connection with the promotion and sale of its goods and services under the Mark. Likewise, Afgritech cannot identify a single employee that has ever made any search, inquiry, or investigation relating to the Mark; that has knowledge of any market research (including surveys, studies, investigations, or focus-group inquiries) relating to the Mark; or that has participated in the creation or distribution of advertisements or promotions for goods or services under the Mark. Nor has Afgritech budgeted or expended any money to promote the Mark, or received any income, or projected any anticipated income, from the sale of goods or services under the Mark.

In addition, Afgritech has absolutely no documentation to substantiate or corroborate its supposed intent to use the AMINOGREEN Mark. Again, Afgritech has supposedly possessed a *bona fide* intent to use the AMINOGREEN Mark for almost *six years*. Yet Afgritech does not have any of the following:

- Any documents relating to its creation, selection, or adoption of the Mark.
- Any trademark, service mark, or Internet domain name investigation or search relating to the Mark.
- Any documents relating to its anticipated first use in commerce of the Mark.
- Any documents demonstrating the types of goods or services in connection with which it intends to use the Mark.
- Any documents relating to the geographic areas and channels of trade in which it intends to use the Mark.
- Any documents relating to any advertising, marketing, or promotional materials in which it intends to use the Mark.
- Any specimens of any product, label, packaging, tag, brochure, advertisement, promotional item, informational literature, or invoice that it intends to use depicting or bearing any form of the Mark, or any documents even *relating to* any such product, label, packaging, tag, brochure, advertisement, promotional item, informational literature, or invoice.
- Any specimens showing any variation of the Mark.
- Any documents relating to any printed or electronic media publication in which it plans to advertise or promote its goods or services in commerce under the Mark.
- Any documents relating to its past, present, or future marketing plans for the Mark.

- Any documents relating to the types of customers with whom it intends to do business under the Mark.
- Any documents relating to any market, demographic, or consumer-profile study, or focus-group inquiry, relating to the Mark.
- Any documents relating its projected sales of goods and services under the Mark.
- Any documents relating to its methods of distribution of goods or services under the Mark.
- Any documents relating to the amount of money that it has expended or budgeted to promote its goods or services under the Mark.

As the Trademark Trial and Appeal Board has recognized, the utter absence of such documents is sufficient to prove that Afgriotech lacked a *bona fide* intent to use the Mark. *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1302; *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1930; *Honda Motor Co.*, 90 U.S.P.Q.2d at 1663; *Boston Red Sox Baseball Club LP*, 88 U.S.P.Q.2d at 1587.

Because Evonik has met its initial burden of proof, the burden of production then shifts to Afgriotech to rebut Evonik's *prima facie* case by offering additional evidence concerning the factual circumstances bearing upon its intent to use the AMINOGREEN Mark in commerce. *E.g.*, *Saul Zaentz Co.*, 95 U.S.P.Q.2d at 1727. Evonik cannot fathom how Afgriotech could do so. It cannot rely on the mere fact that it has filed two intent-to-use applications for the AMINOGREEN Mark. *E.g.*, *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1304. It cannot rely on affidavits claiming that it subjectively intends to use the Mark. *E.g.*, *SmithKline Beecham Corp.*, 97 U.S.P.Q.2d at 1305; *Saul Zaentz Co.*, 95 U.S.P.Q.2d at 1727 (same); *Research in Motion Ltd.*, 92 U.S.P.Q.2d at 1931 (same). Nor can it rely on any foreign registrations or uses. *Honda Motor Co.*, 90 U.S.P.Q.2d at 1664. In short, without *any* documentary evidence of *any*

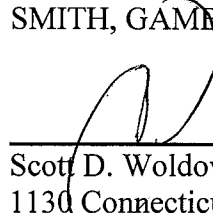
kind to support its supposed *bona fide* intent to use, and without any possible rebuttal evidence, Afgritech cannot show that there is any genuine issue of material fact as to its intent to use the AMINOGREEN Mark.

#### IV. CONCLUSION.

Evonik is entitled to summary judgment that Afgritech does not possess the requisite *bona fide* intent to use the AMINOGREEN Mark. Afgritech has supposedly possessed such intent for six years now, yet has nothing to show for it except one abandoned application. Evonik's Opposition No. 91199752 must be sustained – and Afgritech's Application Serial No. 85/096,047 must be refused – on this ground alone. Afgritech's Opposition No. 91200334 against Evonik's Application Serial No. 79/083,600 for the AMINORED Mark – which was consolidated with Evonik's Opposition No. 91199752 on August 11, 2011 – should remain unaffected by the adjudication of this motion, except that all proceedings in that opposition should be suspended pending disposition of the instant motion pursuant to TBMP § 528.03.

Respectfully submitted this 7<sup>th</sup> day of April, 2012.

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032301.691OPP 9435878.2

In the Matter of Application Serial Nos. 85/096,047 and 79/083,600

v.

Opposition No. 91199752 (parent)  
Opposition No. 91200334

I, Scott D. Woldow, counsel for Evonik Degussa GmbH, do hereby certify that EVONIK DEGUSSA GMBH'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT was on this day served upon Afgritech Ltd. pursuant to 37 C.F.R. § 2.119(b)(4) by first-class mail, addressed as follows:

Pursuant to 37 C.F.R. § 2.119(b)(6) and to the July 21, 2011 letter between counsel for Evonik and Afgritech, a courtesy copy was also sent by email.

This 17<sup>th</sup> day of April, 2012.

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